Supreme Court, U.S.
FILED

98 921 DEC 1 1998

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CYNTHIA F. NORDSTROM,

Petitioner,

v.

PETER J. NORDSTROM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

DONNA J. DETAMORE
DETAMORE AND DETAMORE
1 Greenway Plaza,
Suite 100
Houston, Texas 77046
(713) 627-7747

On the Brief:

CYNTHIA A. FREY
(Counsel of Record)
Post Office Box 593
Great Falls, Virginia 22066
(202) 208-2046

Counsel for Petitioners.

December 1, 1998

Washington, D.C. • THIEL PRESS • (202) 328-3298

QUESTIONS PRESENTED

I. WHETHER FEDERAL LEGISLATION AND POLICY SUPERSEDES THE FIRST COURT OF APPEALS' CONSTRUCTIONS AND INTERPRETATIONS OF TEXAS' CHILD SUPPORT GUIDELINES, WHICH WERE SPECIFICALLY ENACTED BY THE TEXAS LEGISLATURE TO CONFORM WITH THE REQUIREMENTS OF THE FAMILY SUPPORT ACT OF 1988, TO WIT:

1. WHETHER A TRIAL COURT MAY FAIL TO FIND THE NEEDS OF THE CHILD;
2. WHETHER THE FIRST COURT OF APPEALS HAS PROPERLY INTERPRETED AND APPLIED TEXAS' VERSION OF THE FEDERAL DELAWARE MELSON FORMULA TO CALCULATE CHILD SUPPORT;
3. WHETHER THE TRIAL COURT MAY SPECIFICALLY EXCLUDE, OR FAIL TO FIND ALL OF THE INCOME OF THE ABSENT PARENT;
4. WHETHER THE ELIMINATION OF ADDITIONAL FACTORS AND OTHER CONSIDERATIONS FROM THE CHILD SUPPORT CALCULATION IS UNLAWFUL; AND
5. WHETHER THE 1995 REVISIONS TO THE TEXAS FAMILY CODE, WHICH WERE CHANGED IN RESPONSE TO A FEDERAL REGULATORY RULING, MADE RETROACTIVE CHILD SUPPORT MANDATORY, AND WHETHER THE FIRST COURT OF APPEALS' ADDITIONAL REQUIREMENT OF NEED HAS THE EFFECT OF DISQUALIFYING CUSTODIAL PARENTS FROM RECEIVING RETROACTIVE CHILD SUPPORT.

II. WHETHER ASSESSING THE ATTORNEY'S FEES OF THE ABSENT FATHER AGAINST THE CUSTODIAL MOTHER EVEN WHEN THE TRIAL COURT ORDERS AN INCREASE IN CHILD SUPPORT: (1) IS UNLAWFUL IN THAT IT EFFECTIVELY REDUCES CHILD SUPPORT: OR (2) HAS A CHILLING EFFECT ON CUSTODIAL

PARENTS IN TEXAS, EFFECTIVELY DENYING THEM ACCESS TO THE STATE COURTS, OR THE OPPORTUNITY TO RECEIVE AN AWARD OF CHILD SUPPORT BASED ON THE FEDERALLY MANDATED CHILD SUPPORT GUIDELINES.

LIST OF PARTIES

The Petitioner in this proceeding is Cynthia F. Nordstrom. The Respondent in this proceeding is Peter J. Nordstrom.

RULE 29.4(a) LISTING

Cynthia Nordstrom, a party to this Proceeding, is an employee of the Federal Energy Regulatory Commission. According to the requirements of Rule 29.4(a), the Solicotor General of the United States will be served with a copy of this Petition.

RULE 29.4(c) LISTING

The decision of the Texas State First Court of Appeals in this case has misinterpreted and misconstrued Texas child support statutes which were specifically enacted to conform with federal law and regulation. Since this decision by First Court of Appeals is now the law in Texas, the constitutionality of its interpretation and construction of the state statutes is the major issue in this case. Therefore, 28 U.S.C. §2403(b) may apply. According to the requirements of Rule 29.4(c), the Attorney General of the State of Texas will be served with a copy of this Petition.

Page

TABLE OF CONTENTS

Questions Presented i
List Of Parties iii
Rule 29.4(a) Listing iii
Rule 29.4(c) Listing iii
Table Of Contents iv
Reference To Appendix vii
Reference To Lodgings vii
Table Of Authorities ix
Opinions And Judgments Below 1
Statement Of Jurisdiction 2
Statutes Involved 2
Argument:
The Texas First Court Of Appeals Has Destroyed An Entire Scheme of Texas Child Support Statutes Which Were Specifically Enacted To Comply With Federal Law And Policy 3
A. The Success Of The Welfare Reform Act Depends On State Court Orders Assessing Child Support Based On Federally Mandated Child Support Guidelines 5
B. The States Changed Their Child Support Statutes To Conform Specifically With Federal Requirements 7
C. The First Court Of Appeals Has Affirmed Incorrect Constructions Of Four Of The

Page

Most Important Sections Of The Texas Family Code 10

D. Contrary To Federal And State Mandate, The First Court Of Appeals Has Excused The Trial Court From Finding The Needs Of The Child 14

E. The Court Of Appeals Has Destroyed The Proper Interpretation And Application Of Texas' Version Of The Delaware Melson Formula 17

F. The First Court Of Appeals Has Dodged The Federal And State Requirements To Find All Of The Income Sources Of The Absent Parent, And Allowed The Trial Court To Specifically Exclude Substantial Deferred Income 20

G. Contrary To Federal And State Mandate, The First Court Of Appeals Has Eliminated Additional Factors Which Are Intended To Be Included In The Child Support Calculation 22

H. The First Court Of Appeals Has Misinterpreted The 1995 Revisions To The Texas Family Code Which Make Retroactive Child Support Mandatory In Response To An OCSE Action Transmittal.....23

I. By Assessing The Attorneys' Fees Of The Absent Father, Who Had A Reported Income Of $238,980.39, Against The Custodial Mother, The Court Of Appeals Has

Page

Sent A Chilling Message To The Single Mothers Of Texas As To What They Can Expect From The Texas Family Courts. 26

Conclusion 28

REFERENCE TO APPENDIX

State Materials material herein are reproduced in the Appendix To Petition For Writ Of Certiorari, printed and filed concurrently and bound separately. Refer to the Appendix Table Of Contents for a complete listing of items.

REFERENCE TO LODGINGS

Federal Materials herein have been lodged concurrently with following specifications:

Lodging A – *Child Support Guidelines: The next generation,* M. Haynes, Published by the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement, 1994.

Lodging B – Office of Child Support Enforcement Final Rule, Action Transmittal AT-91-02, issued May 16, 1990:

- This Final Rule by the Office of Child Support Enforcement implements five provisions of the Family Support Act of 1988, as amended, including the requirement that state guidelines be used as a rebuttable presumption of child support levels.
- In this Final Rule, the Office of Child support Enforcement requires the states to change their laws to conform with the amendments to the Family Support Act.

– *(continued)* –

Lodging C – Office of Child Support Enforcement, Action Transmittal, AT-9304, issued March 22, 1993:

– In this Action Transmittal, the Office of Child Support Enforcement mandates that retroactive child support must be based on the guidelines

Office of Child Support Enforcement, Action Transmittal AT-9308, issued June 26, 1993:

– In this Action Transmittal, the OCSE clarifies that reimbursement of public assistance through IV-D programs must be based on support obligations established using presumptive guidelines.

Lodging D – "Children Today – Special Issue on Child Enforcement," published by the U.S. Department of Health and Human Services in 1997. The first 17 pages of this magazine explains the basics of child support enforcement from a federal perspective, contains legislative highlights in this area, and describes the changes mandated by the Welfare Reform Act

TABLE OF AUTHORITIES

Page

Cases:

Belcher v. Belcher, 808 S.W.2d 202 (Tex. App. – El Paso, 1991, reh'g overruled) 14

In the Interest of B.I.V., 923 S.W.2d 573 (Tex. 1996) 13, 24

Brown v. Board of Education, 349 U.S. 294 (1955) 5

City of Burbank v. Lockheed Air Terminal, 411 U.S. ___ 5

Clark v. Jamison, 874 S.W.2d 312 (Tex. App. – Houston [14th Dist.], 1994, no writ) 14

Cooper v. Aaron, 358 U.S. 1 (1958) 5

Daniels v. Allen, 811 S.W.2d 278 (Tex. App. – Tyler, 1991, no writ) 9

Drexel v. McCutcheon, 604 S.W.2d 430 (Tex. Civ. App. – Waco 1980, no writ) 9

Ikard v. Ikard, 819 S.W.2d 644 (Tex. App. – El Paso, 1991, no writ) 14

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 5

Liner v. Jafco, 375 U.S. 301 (1964) 5

Marichal v. Marichal, 768 S.W.2d 383 (Tex. App. – Houston [14th Dist.] 1989, writ denied) 9

Nordstrom v. Nordstrom, 965 S.W.2d ___ (Tex. App. – Houston (1st Dist.] 1997, writ denied, pet. for reh'g ref. September 3, 1998) ..... *passim*

Cases, continued: Page

In Interest of Pecht, 874 S.W.2d 797 (Tex. App. – Texarkana, 1994, no writ). 14

Pennsylvania v. Nelson, 350 U.S. 497 (1956) 5

Puerto Rico v. Branstad, 483 U.S. 219 (1987) 5

Rice v. Santa Fe Elevator Corporation, 311 U.S. 218 (1947) 5

Rodriguez v. Rodriguez, 860 S.W.2d 414 (Tex. 1993) 19

Sohocki v. Sohocki, 730 S.W.2d 30 (Tex. App. – Corpus Christi, 1987, no writ). 14

Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942) 5

Thomas v. Thomas, 895 S.W.2d 896 (Tex. App. – Waco, 1995, no writ). 14

Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979). 5

Other Authorities:

The Social Services Amendments of 1974. 6

The Child S ıpport Enforcement Amendments of 1984. 6

The Family Support Act of 1988 . . . . . *passim*

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (The Welfare Reform Act). . . . . *passim*

Other Authorities, continued Page

The Omnibus Reconciliation Act of 1993 6

The Child Support Performance and Incentive Act of 1998 7

The Deadbeat Parents Punishment Act of 1998 7

28 U.S.C. §1257 (1994) 2

42 U.S.C. §667 (1994) 2, 3

45 Code of Federal Regulations §302.56 (1997) 3, 5, 14

Child Support Guidelines: The next generation, M. Haynes, Published in April 1994, by the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement . . . . *passim*

Office of Child Support Enforcement Action Transmittal, AT-91-02 4

Office of Child Support Enforcement Action Transmittal, AT-93-04 23

Tex. Fam. Code Section 14.053(l) (1993) 23

Tex. Fam. Code Section 14.062 (1993) 23

Tex. Fam. Code Section 106.002 (1995) 26

Tex. Fam. Code Section 154.062 (1995) 8, 20

Tex. Fam. Code Section 154.065 (1995) 8, 11

Tex. Fam. Code Section 154.066 (1995) 8

Tex. Fam. Code Section 154.067 (1995) 8

Tex. Fam. Code Section 154.068 (1995) 8

Other Authorities, continued: **Page**

Tex. Fam. Code Section 154.123 (1995) 10
Tex. Fam. Code Section 154.125 (1995) ... 1, 2, 19, 22
Tex. Fam. Code Section 154.126 (1995) ..... *passim*
Tex. Fam. Code Section 154.129 (1995) 8
Tex. Fam. Code Section 154.130 (1995) 11, 14
Tex. Fam. Code Section 154.131 (1995) 13, 14, 25
Tex. Fam. Code Section 156.401 (1995) 24

Petitioner, Cynthia F. Nordstrom, respectfully prays that a Writ of Certiorari issue to review the Opinion of the Texas First Court of Appeals, entered in this matter on November 6, 1997.

OPINIONS AND JUDGMENTS BELOW

The Opinion of the three judge panel of the Texas First Court of Appeals, entered November 6, 1998, is reported in the Southwest Reporter at 965 S.W.2d ___ (Tex. App. - Houston [1st Dist.], pet. ref. September 3, 1998). The Supreme Court of Texas denied the petition for review on July 16, 1998, and refused the petition for rehearing on September 3, 1998. Petitioner had appealed to the First Court of Appeals from a judgment in a Motion To Modify In A Suit Affecting Parent-Child Relationship under the 1995 revisions to the Texas Family Code. The presiding judge of the 245th District Court was the Honorable Annette Galik, held a trial *de novo* on March 15 and March 27, 1996. The Motion To Modify In A Suit Affecting Parent-Child Relationship was filed October 11, 1994. The first hearing was held before the Master, Bruce Kessler, on January 6, 1996. The Petitioner (Appellant in the First Court of Appeals) was and is referred to as the managing conservator, obligee or custodial parent. The Respondent (Appellee in the First Court of Appeals) was and is referred to as the possessory conservator, obligor, non-custodial or absent parent.

STATEMENT OF JURISDICTION

The Texas State First Court of Appeals has construed and interpreted the Texas Family Code Child Support Statutes, which were specifically enacted to conform with the Family Support Act of 1988, and implementing federal regulations and policies, in a manner so as to conflict and contravene federal intent. The jurisdiction of this court is invoked under 28 U.S.C. §1257(a).

STATUTES INVOLVED

This case involves 42 U.S.C. §667 (1994), and sixteen Texas Family Code statutes too numerous to recite. They can be found in Appendix sections C, D, E, F, G, H. I and J.

ARGUMENT

THE TEXAS FIRST COURT OF APPEALS HAS DESTROYED AN ENTIRE SCHEME OF TEXAS CHILD SUPPORT STATUTES WHICH WERE SPECIFICALLY ENACTED TO COMPLY WITH FEDERAL LAW AND POLICY.

Nordstrom v. Nordstrom is a child support modification case brought under the 1995 Revisions to the Texas Family Code. The Texas statutes concerning child support were enacted to conform with the specific requirements of the federal Family Support Act of 1988 (Public Law 100-485), as amended. This decision by the State of Texas' First Court of Appeals in Houston, destroys the entire Texas statutory scheme for assessing child support. Since it is now the law in Texas, the legal precedent in *Nordstrom* will have destructive consequences for thousands of women and children in Texas.

The Family Support Act of 1988 allows states to receive funding under Title IV-D of the Social Security Act if they meet certain federal requirements. One condition of federal funding is that the state must establish guidelines by law or by judicial or administrative action for setting and modifying child support award amounts within the State.[1] The key to child support enforcement

---

[1] 42 U.S.C. §667(a) (1994). At a minimum, the child support guidelines were designed to do the following: (1) Take into consideration all earnings and income of the absent parent; (2) Be based on specific descriptive and numeric criteria; (3) Compute an actual child support amount; (4) Be used in both judicial and administrative proceedings; (5) Be a rebuttable presumption of the correct level of support for a child under the particular circumstances; and (6) Provide for a child's health care needs by means of health insurance coverage or another arrangement. See 45 C.F.R. §302.56 (c) and (f) (1997).

is the cooperation of state court judges. Child support cannot be collected without an order from a state court.[2]

In the *Nordstrom* case, the Texas First Court of Appeals violated the Family Support Act, as amended, and its implementing federal regulations by the Department of Health and Human Services, (OCSE) by: (1) failing to compute an actual child support amount; (2) failing to consider all of the income of the absent parent as prescribed in the federal regulations and the conforming Texas state statutes; and by (3) failing to apply the entire child support guidelines statutory scheme of the Texas Family Code. The Texas First Court of Appeals' decision is, therefore, void as a matter of law.

Whenever Congress acts within the scope of a delegated power, such as the Commerce Clause of the United States Constitution, the Supremacy Clause renders any conflicting state or local law or action void. Federal supersession occurs when a valid act of Congress or federal regulation supersedes any state or local action that conflicts with the federal rule – whether by commanding

---

[2]Congress made the federal guidelines mandatory for state court judges to follow. An Office of Child Support Enforcement OCSE Final Rule, (Action Transmittal, AT-91-02) states in pertinent part:

> Section 103 of Pub. L. 100-485 amended section 467 of the [Family Support] Act, effective October 13, 1989, to **delete the clause that the State guidelines need not be binding upon judges or other officials and to require that the States' guidelines be used to create a rebuttable presumption in any judicial or administrative proceeding** for the award of child support that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. . . . (emphasis added) Lodging B.

or encouraging conduct inconsistent with that required by the federal rule, or by forbidding or discouraging conduct the federal rule is designed to foster.[3]

A. The Success Of The Welfare Reform Act Depends On State Court Orders Assessing Child Support Based On Federally Mandated Child Support Guidelines.

Congress has passed more and related legislation in this area, including The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public law.

---

[3]The Supreme Court has held that the federal courts have the power to order state officials to comply with federal law. See *Puerto Rico v. Branstad*, 483 U.S. 219, 228 (1987); *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 659 (1979); *Illinois v. City of Milwaukee*, 406 U.S. 91, 106-108 (1972); *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958); and *Brown v. Board of Education*, 349 U.S. 294, 300 (1955). *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230-231 (1947), outlines the federal tests of supersession, where there is no express provision of Federal preemption in the Federal statutes.

> So we start with the assumption that the historic police powers of the States were not be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the Federal system will be assumed to preclude enforcement of states laws on the same subject. . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . Or the state policy may produce a result inconsistent with the objective of the federal statute.

City of Burbank v. Lockheed Air Terminal, 411 U.S. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942), and *Liner v. Jafco*, 375 U.S. 301 (1964).

104-193 (the "Welfare Reform Act" as it is popularly known), which depends for its success, on state court orders assessing child support based on the federally mandated guidelines.[4]

In the Welfare Reform Act, Congress mandated new federal and state case registries; new federal and state new hire directories; centralized collection and disbursement of support payments; expanded enforcement authority through – license sanctions, administrative lien procedures, administrative subpoena authority, imposition of work activity, and other provisions which work to compel payment by non-custodial parents. The Welfare Reform Act also mandated state adoption of the Uniform Interstate Family Support Act, simplified provisions for

---

[4]See also The Social Services Amendments of 1974, Public Law, 93-647, which created Title IV-D of the Social Security Act – the Child Support Enforcement Program. In 1984, the Child Support Enforcement Amendments of 1984, Public Law 98-378, required states to use mandatory wage withholding; expedited processes for establishing and enforcing support orders; state income tax refund interception; liens against real and personal property; consumer credit reporting, and paternity establishment any time before a child's 18th birthday. In 1988, The Family Support Act, Public Law 100-485, made numerous changes to the child support program, including: requiring immediate wage withholding for child support orders issued or modified on or after November 1, 1990, unless there is good cause or a written agreement; mandating the use of child support guidelines by judges and other judicial decision makers; requiring review and adjustment of orders; setting program standards and time frames; and requiring states to develop automated systems. The Omnibus Reconciliation Act of 1993, Public Law 103-66, made important changes to paternity establishment and medical support. States are required to have simple civil processes for paternity establishment, including hospital based programs. Insurers are prohibited from discriminating against children because they are born out-of-wedlock or not claimed on a parent's federal income tax. Lodging A.

review and adjustment of support orders, and streamlined paternity establishment provisions. During the last session, Congress passed the Child Support Performance and Incentive Act of 1998 (CSPIA). CSPIA contains a penalty procedure for states who fail to install automated data processing, so the federal government can monitor state performance on child support collections. Sections 201 and 458A amend Title VI of the Social Security Act to allow for incentive payments for states based on their success in child support collections. The "incentive payment pool" for the states is $422,000,000 for fiscal year 2000, and rises to $483,000,000 for fiscal year 2008. Congress also passed the "Deadbeat Parents Punishment Act of 1998," which makes failure to pay child support a federal felony.

B. The States Changed Their Child Support Statutes To Conform Specifically With Federal Requirements.

Since the states were given some latitude in developing their own guidelines, and enacting them into law, the federal methodologies and federal intent were published in January 1994, by the U.S. Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement in *Child Support Guidelines: The Next Generation*, M. Haynes (Federal Handbook, Lodging A). It describes the federal mandates, and presents the federal models used by the states to develop and enact their child support guidelines. A number of the Texas statutes track word for word the language in the Federal Handbook, as well as the language in OCSE Action Transmittals.

It is clear that child support has become a major federal priority. According to the Federal Handbook, Congress anticipated that because a state's guidelines would be based on actual child rearing data, that child support orders would better reflect the actual costs of raising children. Congress' expectation that child support will be based on the actual costs of raising a child is reflected in the requirement of Texas' §154.126 for the trial court to find "the total needs of the child." In the instant case, Petitioner presented detailed evidence of the costs of raising the child, but the trial court failed to find any needs of the child.

Chapter 3, "Determination of Income," discusses the types of income that are to be included (all types of income) in determining the income of the obligor. Texas' §154.062 (Net Resources) is clearly derived from the specific OCSE regulatory requirement that "all of the income sources of the absent parent" be ascertained and used to calculate child support. In the instant case, the trial court failed to consider the obligor's deferred income which totaled through 1995, exceeded half a million dollars. Verification of all of the absent parent's income was a major federal concern, including verification of self-employment income, imputed income and underemployment. The federal intent is closely tracked in the Texas Family Code statutes concerning the verification of income, including Texas' §154.065 (Self-Employment Income), §154.066 (Intentional Unemployment or Underemployment), §154.067 (Deemed Income) and §154.068 (Wage and Salary Presumption). App. 40a.

The issues of incorporating multiple families are discussed in the Federal Handbook, using a specific mathematical formula to assist in the calculation. Section 154.-129 of the Texas Family Code (Alternative Method of

Computing Support for Children in More Than One Household) is a direct reflection of these computations, and the mandates of the federal government's guideline methodology, as are all of the other state statutes. App. 00a.

Current federal law does not require the states to adopt a particular type of support guideline. Although the state guideline calculations vary, they are based on three models: the percentage of income model, the income-shares model, and the Delaware Melson formula. After providing for basic needs, the Delaware Melson formula allows a child to benefit from each parent's remaining income. Lodging A. Texas has adopted a variant of the Delaware Melson formula for §154.126 cases (Application of Guidelines to Net Resources of More Than $6,000 Monthly), the applicable statute in the *Nordstrom* case. App. 47a. Section 154.126 has two parts. Subsection (a) requires the court to use the figure from a percentage of income chart in §154.125 (Application of Guidelines to Net Resources of $6,000 or Less) as a starting point or "presumptive award." Subsection (b) requires that the presumptive award be subtracted from the "proven total needs of the child." The remaining amount of the child's needs, called the "additional need," is then "allocated between the parties . . . according to the circumstances of the parties." It is therefore a requirement of the statute to actually calculate the needs of the child and find the income of the non-custodial parent, in order to perform the Delaware Melson analysis of §154.126.

Chapter 7 of the Federal Handbook, "Adding to the Basic Support Obligation," directs the states to include provisions for extraordinary expenses, health care, child

care and the costs of a post-secondary education. "Because the goal in most states is to provide children with [a level of child support] to support a standard of living as close as possible to what they would have had if the family had been intact, all states need to address these issues." Lodging A, Chapter 7 at p. 62. Chapter 9 of the Federal Handbook, "Criteria From State Child Support Guidelines," discusses what in Texas are the §154.-123 Factors to Consider. These factors which would allow deviations from the guidelines include multiple families, extraordinary health care costs, health insurance premiums, child care expenses, post secondary education costs, tax considerations and extended custody and visitation arrangements. It is the federal intent that all of these factors are to be used in all child support cases. There is no question that the Texas Legislature enacted its entire statutory scheme in 1993 and revised it in 1995 to conform with closely federal intent. However, as discussed below, the Texas First Court of Appeals has taken a state action which is contrary to federal mandate (as well as conforming state mandate), and it must fail in the face of federal supremacy.

C. The First Court Of Appeals Has Affirmed Incorrect Constructions Of Four Of The Most Important Sections Of The Texas Family Code.

In a few short pages of its Opinion, the First Court of Appeals has excused the trial court from finding the needs of the child. Now, the trial court only has to "consider" the needs of the child. It has eliminated the use of the §154.123 factors, established a misconstruction of §154.126, and nullified §154.126(b), which

addresses the additional needs of the child. This will disadvantage single mothers in Texas, as they are very likely to have the lower income. It has made retroactive child support unattainable. In essence, the Court of Appeals has decided that the "guidelines" consist only of the percentage charts in §154.125.

Nordstrom affirms clearly incorrect statutory constructions, findings and applications of §§154.126, 154.130 (Findings in a Child Support Order), 154.131 (Application of Guidelines to Retroactive) and 154.062 (Net Resources) of the Texas Family Code. The Trial Court ignored the evidence and proof offered by Petitioner without any explanation or any finding of the needs of the child. At the same time, the Court in *Nordstrom* allowed counsel for the absent parent to arbitrarily pick and choose items from the custodial parent's shorthand rendition of monthly expenses, App. 57a, and make up and change the figures proven by the Petitioner by her testimony and physical evidence, in order to achieve an artificially reduced level of the child's needs.

The trial court used a 1994 tax return to determine Respondent's income, and specifically excluded deferred income. App. 71a. However, the test year in this case was 1995, where Respondent had reported income of over $238,000. App. 84a.

Further, Texas' carefully worked out version of the Delaware Melson formula has been completely contravened by the Court of Appeals' misconstruction of the proportionate mathematical formula of §154.126, and by its holding that §154.126(b) is optional, thereby establishing a ceiling of the statutory minimum, instead

of the floor intended by the statute. Directly applicable to this case, Chapter 1 of the Federal Handbook, "An Overview of Child Support Guidelines in the United States", at pp. 3-4, Loding A, states:

> At the upper end of the income spectrum, it is difficult to arrive at a formula that can yield fair results . . . .It seems reasonable then, that the guidelines themselves should specify an income level above which the formula no longer applies. . . . The guidelines should specify that the upper limit of the formula should serve as a "jumping off point". . . . A more questionable element of guidelines in some states is an absolute ceiling on the amount of child support. For example, one state provides that obligors with net income higher than $4,000 per month cannot have child support set at a higher level than if the income were $4,000 per month. **This conflicts directly with economic evidence on the costs of child rearing. By setting an absolute ceiling on child support that limits effective application of the guidelines to a fraction of cases, this author questions whether this provision complies with federal intent.** (emphasis added)

The Court of Appeals has specifically approved a completely incorrect construction of §154.126, which takes 20% of the custodial mother's net monthly income under the percentage tables in §154.125 (Application of Guidelines to Net Resources of $6,000 or Less), and adds the [$1200] dollar minimum from the same chart that Respondent is required to pay under §154.126(a), and then argues that the sum is more than enough to meet the artificially reduced needs of the child. The result is an award of child support in which the absent parent, who has had a consistently high income for many years, pays

less than 8% his net monthly income U.S.-based income for child support – whereas, if he has a substantially lower income, he would pay a mandatory 20% according to the percentage of income charts in §154.125. This circumstance creates a child support apportionment where the mother, with less than one third of the income and assets of the father, pays two thirds of the needs of the child, as she has done for years. This decision will place mothers in a position where they are spending their every available earned dollar to support their children, run the danger of going into debt and cannot save for college – making college a financial impossibility for many children in Texas, since child support ceases at age 18.

The Court of Appeals, moreover, has improperly interpreted the statute providing for retroactive child support, §154.131, and has guaranteed that years of past escalating inequities in support burdening custodial parents will never be addressed. The Court of Appeals also adds a requirement of "need" that is not in the statute, and has disregarded the guidance of the Texas Supreme Court in *In the Interest of B.I.V., A Minor Child*, 923 S.W.2d 573 (Tex. 1996) which interprets the legislative intent of the retroactive child support statute to be one of economic fairness. Furthermore, affirming an award of attorney's fees against the custodial mother, despite a finding of a material and substantial change justifying an increase in child support, the *Nordstrom* decision has a chilling effect, ensuring that thousands of women in Texas will not seek the support to which their children are entitled.

D. Contrary To Federal And State Mandate, The First Court Of Appeals Has Excused The Trial Court From Finding The Needs Of The Child.

Congress anticipated that because a state's guidelines would be based on child rearing data, that child support orders would better reflect the actual costs of raising children.[5] Further, Congress' expectation that child support will be based on the actual costs of raising a child is reflected in the requirement of §154.-126 for the trial court to find "the total needs of the child." Consistent with the manner of similar cases reported in Texas since 1993,[6] Petitioner proved that the needs of the child amounted to $4,065.00 per month, based on 1995 expenses (including additional needs, and exclusive of legal fees) by submitting canceled checks, billings, receipts, charge card records and other documentation, as supplemented by Petitioner's testimony. Following cross-examination by Respondent, and numerous tabulations and calculations, the documentation provided of Petitioner's expenses closely supported the figures in her shorthand rendition. App. 73a and App. 74a. The findings of the trial court should have reflected those figures. On March 25, 1996 and April 11, 1996, the trial court issued §154.130 findings, App. 3a,

---

[5] 45 C.F.R. §302.56(c) and (f) (1997).

[6] *In Interest of Pecht*, 874 S.W. 2d 797 at 802 (Tex. App. - Texarkana, 1994, no writ), *Clark v. Jamison*, 874 S.W. 2d 312 at 316 (Tex. App. - Houston [14th Dist.], 1994, no writ), *Ikard v. Ikard*, 819 S.W. 2d 644 (Tex. App. - El Paso, 1991, no writ), *Thomas v. Thomas*, 895 S.W. 2d 896 (Tex. App. - Waco, 1995, no writ), *Sohocki v. Sohocki*, 730 S.W. 2d 30 (Tex. App. - Corpus Christi, 1987, no writ), and *Belcher v. Belcher*, 808 S.W. 2d 202 at 204-207 (Tex. App. - El Paso, 1991, reh'g overruled).

which were identical in all significant respects to the findings from the January 12, 1996 hearing in front of Magistrate Bruce Kessler, App. 4a, with the addition of the assessment of attorney's fees against Petitioner, the custodial mother. The trial court ignored the testimony and proof, and specifically failed to make any findings as to the needs of the child.

The First Court of Appeals only speculated or provided excuses for why the Judge failed to find the needs of the child. But it does not require an explanation, holding that these matters are within the judge's discretion. App. 18a.

Now the following method of determining the needs of the child is acceptable in Texas. As shown from the record, Respondent's attorney achieved a reduced "need" figure for the child by eliminating major categories of household expense, making up and changing proved figures and picking and choosing from Petitioner's shorthand rendition, App. 57a, while the trial court judge wrote them down. App. 57a.

> Miss Broussard [Attorney for Respondents]: Okay, do you actually know how many miles in a year you spend going back and forth to town for Sarah's needs only . . .?
>
> [Miss Broussard suggests a dollar figure for transportation for Sarah and writes it on the blackboard.]
>
> Miss Broussard: Judge, is there anything on here that you want to copy down anything [sic]?
>
> The Court: I have it all.
>
> Miss Broussard: Okay.
>
> . . . .
>
> [Miss Broussard adds 20% of Petitioner's net monthly income to the statutory minimum ($1,200.00) for Respondent, which constitutes eight percent

(8%) of his monthly income to reach a figure of $2,292.00 for the needs of the child. She multiplies it by thirty-eight percent (38%) for housing expenses.]

Miss Broussard: Tell me what thirty-eight percent (38%) of $2,292.00 is.

Mrs. Nordstrom: $870.96.

Miss Broussard: I'm going to read off some of the numbers from your Exhibit No. 14 [Petitioner's shorthand rendition of her expenses] and ask you to add them together for me, okay?

Mrs. Nordstrom: All right.

Miss Broussard: So starting off with this $871.00, add in $725.00.

Ms. Detamore; Judge I have to object. That's a misstatement of the witness. $871.00 is [] not on her exhibit. That's a figure that Miss Brossard just [] provided by asking my client what's thirty-eight percent (38%) of two other figures.

Miss Brossard: All right, the $275.00, the $150.00, and I'm going to put a star by that one because we're going to come back to that one, $50.00 for doctor and dentist, school expenses of $20.00, lunches of $120.00, hair cuts of $12.00, clothing of $200.00, entertainment of $100.00, allowance of $40.00, piano lessons of $60.00 and sports equipment of $30.00, can you tell me what that number is when you total it all up?

Mrs. Nordstrom: I came up with $1,928.00.

The trial court must find the total needs of the child, in order to properly apply the formula of §154.126. All of the needs of the child do not just include actual dollars spent directly on the child, but a share of indirect expenses and the costs of maintaining a household, as a

matter of law. As noted above, a share of these expenses is attributed to the child in all other recent reported Texas cases.[7] Further, these categories of indirect and household expense are listed in the standard from Financial Information Statement used by the Texas family courts. App. 75a.

Nonetheless, the Court of Appeals has held that the trial court has the discretion to determine the needs of the child in this pick and choose fashion, stating, "However, we have already found that no abuse of discretion occurred in determining the needs of the child."[8] The result in the real world is that Petitioner must make up the differential between the "needs" that her ex-husband's counsel selected, and her daughter's actual total needs.

E. The Court Of Appeals Has Destroyed The Proper Interpretation And Application Of Texas' Version Of The Delaware Melson Formula.

As stated above, the trial court did not award additional need because it failed to follow the requirement of §154.126 to find the total needs of the child. Further, contrary to the clear mandate of the statute, counsel for Respondent successfully argued that the total of twenty percent (20%) of Petitioner's net monthly income

---

[7] See ftn. 6.

[8] Amazingly, the Court of Appeals took a page from Respondent's brief and attacked the character of the mother, without checking the truth contained in the record, and in so doing, found another way to disregard the proven needs of the child. Petitioner addressed all of Respondent's allegations in a Supplemental Brief on Rehearing filed in the First Court of Appeals on January 2, 1998.

and eight percent (8%) of Respondent's monthly U.S. based income ($2,292.00) are more than sufficient to meet the "needs" of the child (the reduced figure of §1,928.00). App. 59a. The First Court of Appeals agreed, stating:

> During her testimony, Petitioner agreed that, if the twenty percent (20%) guideline amount were applied to her net resources, the resulting amount would be $1,090.00 per month. When added to Peter's $1,200.00 obligation, the total would be $2,292.00 per month for the support of the child. In its discretion, the court could have found this amount sufficient to satisfy any needs Petitioner actually proved.

Section 154.126(b) clearly mandates that the responsibility for meeting the additional needs of the child above the $1,200.00 threshold is a *proportionate* responsibility. There is a ratio of 3 to 1 between the "circumstances" of Respondent as opposed to the "circumstances" of Petitioner. App. 70a. The apportionment of additional need is simple math. However, in addition to approving the wrong methodology, as described above, the Court of Appeals held,

> Notwithstanding the needs Petitioner may have proven, Section 154.126 vests the court with *discretion* to award additional amounts. It *mandates* only that the court *consider* the needs of the child and the parties' income in arriving at the decision . . . . (emphasis added) App. 18a.

By holding that the trial court may refuse to award child support to cover the "additional needs" of the child in §154.126(b), the court has made the statutory formula for addressing additional need a nullity. This effectively sets a ceiling of the statutory minimum ($1,200.00) for

a high salaried absent parent, instead of a floor intended by the statute.

As noted by the First Court of Appeals, Petitioner did state that she would be happy to follow the guidelines if Respondent followed the guidelines. The Court of Appeals has applied two different standards to the term "guidelines." For Petitioner, "guidelines" meant 20 percent of her net monthly income on the chart on §154.125. For Respondent, "guidelines" meant the $1200 statutory maximum dollar figure on the chart, which is less than 8 percent of his US based income, not 20 percent of his net income – a totally different standard. App. 19a. This approach, now legal precedent, unfairly burdens the parent with the lesser income, and is completely contrary to the mandate and the intent of §154.126(b). The $1200 is a starting point for an obligor who can afford more.

By allowing the trial court complete discretion to ignore the needs of the child, the *Nordstrom* decision opens the door for courts to completely avoid the requirement of §154.126(b) to provide for additional needs according to the "income and circumstances of the parties."

Contrary to recent cases, the Court of Appeals has held that the language of §154.126(b) requiring the trial court to consider the "income of the parties" and "proven needs of the child" to address the additional needs of the child are the only "factors to be considered in awarding additional support." Citing *Rodriguez v. Rodriguez*, 860 S.W.2d 414 (Tex. 1993), a Texas Supreme court decision superseded by the 1993 and 1995 revisions to the Texas Family Code, the Court of Appeal's holding eliminates considerations of "lifestyle" and the §154.123 factors to consider.

F. The First Court Of Appeals Has Dodged The Federal And State Requirements To Find All Of The Income Sources Of The Absent Parent, And Allowed The Trial Court To Specifically Exclude Substantial Deferred Income.

According to the Federal Handbook, Chapter 3, "Determination of Income," Lodging A, discusses the types of income that are to be included (all types of income) in determining the income of the obligor. Section 154.062 (Net Resources) is clearly derived from the specific OCSE regulatory requirement that "all of the income sources of the absent parent" be ascertained and used to calculate child support.

The trial court and the *Nordstrom* decision ignored the requirements of the statute to properly make this finding, and include the appropriate items of income. Despite voluminous testimony and evidence as to Respondent's income, in Petitioner's and Respondent's Exhibits, the trial court used a figure derived from Respondent's 1994 income tax return, instead of his 1995 income for the test year. The trial court did not include approximately thirty percent (30%) of additional compensation for deferred income plans, or for Respondent's Shell Pension Plan.

> The Court: . . . . The Court's findings that Peter John Nordstrom's net monthly resources to be a total amount of $7,654.66. From his 1994 tax return, Movant's No. 1, the Court finds that he has additional investment income of $6,715.00 per year making it an additional $559.42 per month in additional income.
>
> Miss Broussard: And, Your Honor, that number, the $559.00 is included in the $7,654.66 you just found.
>
> The Court: Okay.

Miss Broussard: It is his salary, plus his investment income.

The Court: That's right, the $7,654.66 includes this additional investment income and his salary for a total net resources.

Ms. Detamore: Judge, for the record, it's my understanding and I would object to the finding that the court did not also include the deferred income that he has received or would be receiving in the future deposited by Shell into Deferred Income Retirement Accounts. So for the record, I object that the Court does not include any of those amounts in his net resources.

The Court: The Court fully acknowledges your objection and records it in the record and overrules your objection.

It was proven that Respondent had a gross income of $238,980.39 in 1995, where he was on assignment in the Netherlands. In 1994 he had a gross income of $165,888.-00. He testified that his U.S. based income was $125,000.-00, in addition to deferred income and various other of the proper calculation of Respondent's net resources under the statute by claiming that Petitioner had waived the issue. As Petitioner argued in her brief on appeal, there was clearly a miscalculation of Respondent's income by the trial court.

G. Contrary To Federal And State Mandate, The First Court Of Appeals Had Eliminated Additional Factors Which Are Intended To Be Included In The Child Support Calculation.

Chapter 7 of the Federal Handbook, "Adding to the Basic Support obligation," discusses extraordinary expenses, health care, child care and the costs of a post-secondary education. "Because the goal in most states is to provide children with a standard of living as close as possible to what they would have had if the family had been intact, all states need to address these issues." at p. 62. Chapter 9, "Criteria From State Child Support Guidelines," discusses what in Texas are the §154.123 Factors to Consider, which are intended to increase or reduce the initial guideline child support amount. These factors which would allow deviations from the guidelines, including multiple families, extraordinary health care costs, health insurance premiums, child care expenses, post secondary education costs, tax considerations and extended custody and visitation arrangements. It is the federal intent that the factors are to be used in all cases. The parallels between the Federal Handbook and the Texas Family Code are obvious.

Chapter 1 of the Federal Handbook, Lodging A, "An Overview of Child Support Guidelines in the United States," states, at p. 4, "Each state must establish criteria under which application of the guidelines might be unjust or inappropriate; thus, the states must have a list of specific deviation criteria." Yet, it is clear in Texas, that the "guidelines" are viewed only as the percentage of income charts in §154.125.

H. The First Court Of Appeals Has Misinterpreted The 1995 Revisions To The Texas Family Code Which Make Retroactive Child Support Mandatory In Response To An OCSE Action Transmittal.

The OCSE issued Action Transmittal (AT-93-04) on March 22, 1993, Lodging A, addressing the issue of awarding retroactive child support as follows:

> *USE OF PRESUMPTIVE GUIDELINES IN SETTING SUPPORT FOR PRIOR PERIODS*
>
> In setting support awards, states are required, at a minimum, to take into consideration the obligor's earnings and income, in accordance with 45 CFR 302.56(c) (1). The establishment of a child support award covering a prior period must be based on guidelines and take into consideration either the current earing and income at the time the order is set, or the obligor's earnings and income during the prior period. The award of back support is not required under Federal rules but may be appropriate in accordance with State law.

The 1995 Revisions to the Family Code show that the Texas legislature responded to the OSCE. It amended and added several statutes, which read together intend retroactive child support to be mandatory, by statutory construction. Section 154.009 (Retroactive Child Support) was added to Texas Family Code in 1995 (App. 38a). It was derived from 14.062, its predecessor in the 1993 Texas Family Code. App. 35a. In the 1995 Revisions, the legislature removed the requirement that the court be guided by the evidentiary factors contained in 14.053(1). (Bolded in App. C). This language was replaced with §154.009(b) "shall" language which states: "*In ordering*

retroactive child support, the court shall apply the child support guidelines provided by this chapter" (emphasis added). Then 154.131 logically follows as it is entitled "Application of Guidelines To Retroactive Support." App. 52a. These are the "*guidelines [for retroactive child support] provided by this chapter.*" The legislature took out "evidentiary factors" of 14.053(1), which are presumed to be left to the discretion of the trial court. According to the rules of statutory construction, omissions from existing provisions when new provisions are enacted are presumed to be intentional.

Section 156.401(b) of the Texas Family Code provides that a child support order may be modified retroactively back to either the date of service of citation or to the appearance date of the obligor in the suit to modify. App. 54a. Petitioner argued below that the statutes read together shift the burden of proof to the obligor after the obligee has plead for retroactive child support. Although this interpretation wholly is consistent with OCSE intent, the court did not apply this standard.

The Texas Supreme Court held, in *In the Interest of B.I.V.*:

> Retroactive child support may represent . . . funds owed the supporting parent to discharge his or her proportionate duty of financial support to the child. . . . [P] ayment of child support arrearages 'compensates for the wrong to the child at least as much as it reimburses the custodial parent for monies spent on the child.' . . . [T]he legislature has recognized that the supporting parent suffers a financial loss as well, for which he or she is entitled to be compensated. 923 S.W.2d at 925

The Texas Supreme Court has recognized that retroactive child support represents a proportionate duty to support of the child, "but also the right to reimbursement afforded someone who has supported the child in the meantime." Retroactive child support is a mechanism to remedy unfairness, including unfairness created and which continues to escalate and compound over time created by an inadequate amount of child support set under a legislative scheme (in effect at the time of the divorce) which was discarded by the legislature in 1993.

A burden shifting approach is used to determine retroactive child support in paternity cases, and it should be used in child support modification cases. App. 00a. Instead of requiring Respondent to meet his burden of proof under §154.131, that retroactive child support represented a financial hardship – a fact he clearly could not prove; the *Nordstrom* decision adds a new requirement that is not in the statute, requiring the obligee/mother must prove a "need" for retroactive child support. Retroactive child support is rarely awarded in child support modification cases, despite the wording and construction of the Texas statutes. Yet, it is clear that the Texas legislature modified the 1995 Texas Family Code to make retroactive child support, based on the guidelines, mandatory back to the date of service or filing of the suit for modification, consistent with federal intent.

I. By Assessing The Attorneys' Fees Of The Absent Father, Who Had A Reported Income Of $238,-980.39 Against The Custodial Mother, The Court Of Appeals Has Sent A Chilling Message To The Single Mothers Of Texas, As To What They Can Expect From The Texas Family Courts.

The Court of Appeals upheld the award of attorney's fees against the custodial mother, despite the fact that the trial court found a change in circumstances justifying a modification in child support, and awarded more child support then awarded under the original divorce decree in 1989. This increase in child support was ordered even without a finding that the award against the custodial parent will benefit the child. The assessment of attorney's fees against the custodial mother is contrary to every reported case in Texas in memory. Respondent has not disputed this during the state appeals process.[9] This holding will discourage thousands of custodial parents from seeking the child support they are entitled to under the Family Code, and effectively bars them from access to the courts. The assessment of attorney's fees against Petitioner was a punishment for appealing Magistrate

---

[9] This is settled law in Texas. *Drexel v. McCutcheon*, 604 S.W. 2d 430, 435 (Tex.Civ.App.-Waco 1980). In *Daniels v. Allen*, 811 S.W. 2d 278 (Tex. App.-Tyler 1991, no writ), the Court of Appeals affirmed the award of attorneys fees to the custodial parent as "necessaries of the child." See also *Marichal v. Marichal*, 768 S.W. 2d 383 (Tex. App. - Houston [14th Dist.] 1992, no writ) [this case was cited incorrectly by the First Court of Appeals for the opposite proposition for which it stood]. The Court of Appeals claimed that Petitioner had waived this issue. She did not – it was specifically included as an issue in Petitioner's revised brief. Further, §11.18 of the Texas Family Code allows reasonable attorneys fees to be taxed as costs.

Kessler's hearing on January 6, 1996. As previously noted, the bench judge, Judge Galik, of the 245th District Court, ignored the evidence presented by petitioner, and rubber-stamped Magistrate Kessler in all major respects.

The Court of Appeals has created a scenario where a single mother, bearing the overwhelming cost of supporting a child, can wait for a substantial period of time on a family court docket for a modification, present her receipts, bills, canceled checks and testimony as to the needs of the child, and can be dealt with contrary to statute by the trial court. She runs the risk of being booted out the door with a minimal amount of child support, openly disparaged, and assessed with her ex-husband's attorney's fees, no matter how high his income. The First Court of Appeals has made this law in Texas, and thousands of children will suffer for it.

CONCLUSION

The *Nordstrom* decision sets a dangerous precedent in Texas that will have a devastating impact on its children, now and in the future. If this decision is allowed to stand, there is a risk that the First Court of Appeals' holdings and misconstructions of Texas' child support statutes could spread to the family courts of other states. Congress has invested heavily in the success of the child support guidelines which is has mandated. The lack of cooperation by state court judges in this area threatens to undermine major federal legislation and federal programs. The petition for a writ of certiorari should be granted.

Respectfully submitted,

DONNA J. DETAMORE
DETAMORE AND DETAMORE
13430 Northwest FWY,
Suite 150
Houston, Texas 77040
(713) 462-6575

On the Brief:

CYNTHIA A. FREY
(Counsel of Record)
P.O. Box 593
Great Falls, Virginia 22066
(202) 208-2046
Counsel for Petitioner.

December 1, 1998